



IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

No. 77-103

THE LEO FOUNDATION,
Petitioner

vs.

THE STATE OF NEW HAMPSHIRE,
Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF NEW HAMPSHIRE

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PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF NEW HAMPSHIRE

Petitioner prays for a Writ of Certiorari to review the judgment of the Supreme Court of New Hampshire and its order denying Petitioner's Petition for Rehearing.

REFERENCE TO THE REPORT OF THE
OPINIONS DELIVERED IN THE COURT BELOW

A copy of the opinion of the Supreme Court of New Hampshire dated March 31, 1977 is attached as Appendix A, *infra*. It is a published opinion which has not been given an official citation as of the date of the printing of the Petition herein. A copy of the Petitioner's Petition for Rehearing is attached as Appendix B, *infra*. The Order of the Supreme Court of New Hampshire denying the Petition for Rehearing dated April 29, 1977 is attached as Appendix C, *infra*.

CONCISE STATEMENT OF THE
GROUNDS ON WHICH JURISDICTION
OF THIS COURT IS INVOKED

The Statutory provision conferring on this Court jurisdiction to review the judgment of the Supreme Court of New Hampshire is *28 USC Section 1257 (3)*.

The date of the judgment of the Supreme Court of New Hampshire sought to be reviewed herein is its decision filed March 31, 1977 on which a certificate of order issued on April 30, 1977 by operation of law. *NH RSA 490:16*, and the order of the Court denying a rehearing dated April 29, 1977.

The judgment of the Supreme Court of New Hampshire resulted from that Court's making a ruling that a Commission appointed by the Governor and Council of the State, to conduct a hearing to determine whether there was occasion for the laying out of a highway, was not an unfair tribunal even though one of the three members of the Commission was employed full-time by the Highway Department of the State of New Hampshire as a right-of-way agent. Said decision of the New Hampshire Supreme Court denied The Leo Foundation's basic Constitutional rights of due process.

QUESTIONS PRESENTED FOR REVIEW

The question presented for review is as follows:

Has The Leo Foundation been denied its constitutional right to due process because an employee of the State Highway Department was a member of a Commission which determined there was occasion for the laying out of a highway and also determined the location of said highway to be over the land owned by The Leo Foundation?

CONSTITUTIONAL PROVISIONS, STATUTES AND
REGULATIONS WHICH THIS CASE INVOLVES

United States Constitution, Amendment V.

"No person shall . . . be deprived of life, liberty or property without due process of law; . . ."

CONCISE STATEMENT OF THE CASE

Petitioner, The Leo Foundation, appealed to the Superior Court of New Hampshire from the layout of a highway to public waters, namely, a lake in Gilmanton, New Hampshire, under New Hampshire RSA 235:1.

On March 1, 1967 ten residents of the State of New Hampshire petitioned the Governor and Council to layout a highway from an existing public highway in Gilmanton, New Hampshire to Manning Lake in Gilmanton. The Governor and Council appointed a Commission to conduct a hearing to determine whether there was occasion for laying out of such a highway and if so, to determine its location. A hearing was held and the Commission determined that there was occasion for the laying out of such highway, and that the location of said highway should be over land owned by the Petitioner, The Leo Foundation.

One of the three members of the Commission making the determination was employed full-time by the State Highway Department as a right-of-way agent.

Payments for damages for property to be taken and also payments for construction come from the same State Highway Department's budget and, prior to the convening of the Commission, the State Highway Department made a determination that there was no public access to Lake Manning.

The Petitioner, The Leo Foundation, took the position that the Commission's decision was void and that the Commission was an unfair tribunal because of the conflict of interest of the employee of the State Highway Department.

The Superior Court denied the Petitioner's request for a ruling that the Commission was an unfair tribunal and the New Hampshire Supreme Court on appeal affirmed the Superior Court's ruling.

The New Hampshire Supreme Court ruled that since the employee of the Highway Department testified that he had not been involved in the original determination made by the State Highway Department that there was no public access to Lake Manning and since he further testified that the Commission on which he served had only been concerned with the location of the right-of-way to Lake Manning and not with the costs of construction, the record did not compel a conclusion that a conflict of interest was shown which would invalidate the Commission's actions.

DIRECT AND CONCISE ARGUMENT

THE LEO FOUNDATION HAS BEEN DEPRIVED OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW BECAUSE THE COMMISSION WHICH DETERMINED THAT ITS LAND SHOULD BE TAKEN FOR A HIGHWAY WAS NOT FAIR AND IMPARTIAL.

It is a basic right of the United States Constitution that a person's property cannot be taken from him without "due process of law." The *United States Constitution, Amendment V*. Fundamental due process requires that a tribunal making a determination be fair and impartial. "A fair trial in a fair tribunal is a basic requirement of due process." *Re: Murchison*, 349 US 133, 99 L Ed 942, 75 S Ct 623.

Impartiality is lacking where a member of the tribunal has a pecuniary interest in the outcome of the proceedings. *Tumey v. Ohio*, 273 US 510, 71 L Ed 749, 47 S Ct 437, 50 ALR 1243.

In the instant case, it is obvious that the Highway Department was totally enmeshed in the matters involving The Leo Foundation and the location of a highway over The Leo Foundation's Property so as to make it most inappropriate for an employee of the Highway Department to be sitting as a Judge in a determination of the taking of The Leo Foundation's property. The circumstances of this case reveal that the

Commission proceedings did not measure up to the requirements of a trial before "an unbiased Judge" which is essential to due process. See *Johnson v. Mississippi*, 403 US 212, 29 L Ed 2d 423, 91 S Ct 1778; *Bloom v. Illinois*, 391 US 194, 205, 20 L Ed 2d 522, 531, 88 S Ct 1477; *Mayberry v. Pennsylvania*, 400 US 455, 465, 27 L Ed 2d 532, 540, 91 S Ct 499.

In the instant case, the interest of the Highway Department is not so minute, remote, trifling or insignificant that an employee sitting in judgment of the case will not deprive the Petitioner, The Leo Foundation, of due process of law. See *Tumey v. Ohio*, 273 US 510, 71 L Ed 749, 47 S Ct 437. Here, the actual payments for damages for the property taken come from the State Highway Department's Budget. Furthermore, the payments for construction of the highway come from the State Highway Department's budget. Thus, the State Highway Department had a direct pecuniary interest in the outcome of the proceedings and it was most unfair and improper for an employee of the same Highway Department to be sitting on the very Commission which made a determination that a highway should be laid out over the Petitioner's land.

Even prior to the convening of the Commission, the State Highway Department had made a determination that there was no public access to Lake Manning. Obviously, such a set of circumstances indicates that the State Highway Department had an interest in determining an access to Lake Manning. The Highway Department was directly adverse to the interests of the Petitioner, The Leo Foundation. It is manifestly improper to have to submit a matter to a tribunal of which a person's adversary is a member. Such a procedure obviously does not afford due process of law. See *Union Drainage District v. Smith*, 233 Ill. 417, 84 NE 376; *Payne v. Lee*, 222 Minn. 269, 24 NW 2d 259.

It is not enough to answer that the Highway employee who sat on the Commission in this case was not personally involved

in the prior determination made by the Highway Department that there was no public access to Lake Manning. Also, it is not enough to hide the conflict of interest in this case by having the employee claim that the Commission was only concerned with the location of the right-of-way to Lake Manning and not the costs of construction. The State Highway Department was certainly concerned with the costs of construction and the costs of payments made for damages which would necessarily result from the location of the right-of-way.

Under these circumstances there was *in fact* a conflict of interest by an employee of the State Highway Department sitting in judgment on the Commission which determined that there was occasion for the laying out of a highway and further that the location of the highway should be over the land of The Leo Foundation. Thus, The Leo Foundation has been denied fundamental due process because of the partiality of the Commission sitting in judgment of the determinations relating to the taking of its property.

CONCLUSION

This case involves the taking of property of The Leo Foundation without due process. This is a substantial right guaranteed by the United States Constitution.

An employee of the State Highway Department participated as a member of a Commission which determined the taking of the Petitioner's, The Leo Foundation's, property. The decision of the Commission must be declared void because the State Highway Department had a direct pecuniary interest in the Commission's determinations.

It is respectfully requested that the United States Supreme Court take jurisdiction of this matter and rule that the Commission's decision is void under the United States Constitution.

The Leo Foundation
by Its Attorneys

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APPENDIX A

OPINION OF THE SUPREME COURT
OF THE STATE OF NEW HAMPSHIRE

Belknap
No. 7452

THE LEO FOUNDATION

vs.

STATE OF NEW HAMPSHIRE

March 31, 1977

Nighswander, Lord, Martin & KillKelley (Mr. David J. KillKelley orally)
for the plaintiff.

David H. Souter, attorney general, and Roger G. Burlingame, assistant
attorney general (Mr. Burlingame orally), for the State.

LAMPRON, J. Plaintiff appealed to the superior court from the lay out of a highway to the public waters of Manning Lake in Gilmanton under RSA 235:1. Trial by the Court (*Batchelder, J.*), with a view, resulted in a decree dismissing the appeal. During the course of trial plaintiff seasonably excepted to the court's rulings, to the dismissal of its appeal, and to the court's denial of its eight requests for findings of fact and rulings of law. All questions of law raised by plaintiff's exceptions were reserved and transferred.

An appeal to this court plaintiff argues only two of the issues raised by its exceptions below. First that the commission failed to lay out a highway from an existing public highway. Second that the decision of the commission should be void because one

of the commissioners was an employee of the highway department. We affirm the trial court's rulings on both these issues.

On March 1, 1967, ten residents of the State of New Hampshire petitioned the Governor and Council to lay out a highway from an existing public highway in Gilmanton to Manning Lake in accordance with RSA ch. 235. The Governor and Council appointed a commission to conduct a hearing to determine whether there was occasion for the laying out of such a highway, and if so, to determine its location. A hearing was held on November 18, 1967, at which representatives of plaintiff were present and argued against the lay out. By return of layout dated August 28, 1968, the commission determined that there was occasion for the laying out of such highway, and that the location of said highway should be over land owned by plaintiff. This determination was accepted by the Governor and Council on September 30, 1968. Plaintiff appealed the determination of the commission to the superior court. RSA 235:5. Trial of the case was held commencing February 5, 1975. It is the appeal therefrom which is now before us.

In order to lay out a highway to public water the commission must determine that there is occasion to lay out such a highway "from an existing highway to any public water in this State . . ." RSA 235:1. There is no dispute that Manning Lake, a natural body of water in excess of twenty acres, is "public water" within the meaning of this section. RSA 271:20. However, plaintiff argues that Pond Road, from which the proposed highway was laid out, was not shown to be an existing "highway" as defined by RSA 230:1 (Supp. 1975). This section defined "highways" as follows: "Highways are only such as are laid out in the mode prescribed therefore by statute, or roads which have been constructed for public travel over land which has been conveyed to a city or town or to the state by deed of a fee or easement interest, or roads which have been dedicated to

the public use and accepted by the city or town in which such roads are located, or roads which have been used for public travel . . . for twenty years prior to January 1, 1968 . . ."

At trial there was no evidence produced that Pond Road had been laid out in the mode prescribed by statute, that it had been constructed for public travel over land conveyed to the town of Gilmanton, or that it had been dedicated to public use and accepted by the town. David M. Bickford, a selectman for the town of Gilmanton, and a resident for over sixty years, testified that it would be "virtually impossible" to find any records showing that Pond Road had been formally laid out as a town road. However, he did not testify that Pond Road had not been so laid out; nor did he testify that Pond Road had not been established in any other manner described by RSA 230:1 (Supp. 1975).

Mr. Bickford testified that Pond Road had been used by the public as a public highway "for at least the last thirty or forty years." Mr. Paul R. Morse, who owned property abutting on Pond Road from the mid 1940's through the late 1960's, testified that the road ~~was~~^{was} generally by the public during that period of time. Mr. Morse testified that members of the public often traveled up Pond Road looking for a place to swim. There was also testimony that Pond Road was used by the public during that period of time to gain access to a beach area on Lake Manning, located near the beginning of the road. Such use, while it may have been "intermittent and of slight volume," is nevertheless sufficient to sustain a finding that Pond Road was established by prescription, the use being "characteristic of the kind of road claimed." *Blake v. Hickey*, 93 N.H. 318, 321-22, 41 A.2d 707, (1945). Such use is also continuous when not interrupted by assertion of any paramount right. *Williams v. Babcock*, 116 N.H., 368 A.2d 116 (1976); *Jean v. Arsenault*, 85 N.H. 72, 75, 153 A. 819, (1931).

Plaintiff argues that Pond Road was used only for private

travel by plaintiff and its guests, and by abutters. Although these people may use the road more frequently than other members of the general public, they too are members of the public, and such use of the road is consistent with the definition of public use. There was no evidence that plaintiff or any of the abutters had ever attempted to bar others from using Pond Road. There was evidence from which the trial court could properly find that the members of the public using Pond Road did so under a claim of right. *White Mt. & c. Co. v. Levesque*, 99 N.H. 15, 17, 104 A.2d 525, 526 (1954).

Other evidence at the trial also showed Pond Road to be a public highway. In the early 1940's, shortly before plaintiff acquired its property known as Camp Manning, or Camp Leo, the portion of Pond Road which lay beyond Moulton Brook, located in the Camp property, was discontinued. In 1952, the portion of Pond Road running between the entrance to the camp property and Moulton Brook was also discontinued by vote of the town meeting of Gilmanton. Were Pond Road merely a private way, these discontinuances would not have been necessary. In addition, when plaintiff appealed the town's action in 1952 and petitioned for damages, it consistently referred to Pond Road as a public highway.

Finally, plaintiff introduced evidence that it, rather than the town, had undertaken to repair, maintain, and plow Pond Road. However, these actions were accompanied by repeated attempts by plaintiff, at least through the late 1960's to have the town perform these functions. Plaintiff could be found to have then considered the road to be a public highway for which the town was responsible. Whether or not the town fulfilled its responsibility to maintain and plow the road does not alter its public character. See 2 B. Elliott and W. Elliott, *The Law of Roads and Streets* § 1174 (4th ed. 1976). The testimony regarding public use of Pond Road covered a period of time from at least the mid 1940's to the late 1960's. Nonuse for any significant period

of time, or adverse private use would not constitute a discontinuance of a public highway. See *Thompson v. Major*, 58 N.H. 242 (1878); *Windham v. Jubinville*, 92 N.H. 102, 25 A.2d 415 (1942); RSA 249:30.

In denying plaintiff's requests for findings and rulings that Pond Road was not an existing highway, or that it was a private way, and in dismissing plaintiff's appeal, the trial court necessarily found that Pond Road was a public highway, established by prescription or otherwise. See *Post Road Realty, Inc. v. Zee-Bar, Inc.*, 117 N.H., A.2d (1977). Such finding by the trial court, which also had the benefit of a view, is supported by the record. We therefore affirm the trial court's rulings. *Gerrish v. Wishbone Farm*, 108 N.H. 237, 231 A.2d 622 (1967).

The trial court also denied plaintiff's request for a ruling that the commission was an unfair tribunal because one of its three members, Maurice Caswell, was employed full-time by the highway department as a right-of-way agent. In *Papademas v. State*, 108 N.H. 456, 237 A.2d 665 (1968) we held that the appointment of an employee of the highway department to a layout commission is not forbidden by the provisions of RSA ch. 235. *Id.* at 458, 237 A.2d at 667. There being no evidence presented of an interest of the highway department contrary to that of the public, we further held the claim of conflict of interest to be "too attenuated and unsubstantial" to void the commission's decision. *Id.* at 458-59, 237 A.2d at 667.

In this case plaintiff claims that because the payments for damages for the property taken and for construction come from the highway department's budget, and because the highway department made the determination, prior to the convening of the commission, that there was no public access to Lake Manning, there was a showing of a conflict of interest such as to render the commission's decision void.

The only evidence presented on this issue was the testimony

of Mr. Caswell himself. However, he testified that he had not been involved in the determination that there was no public access to Lake Manning. He also testified that the commission had only been concerned with the location of the right-of-way to Lake Manning, and not with the cost of construction. There is nothing in the record to indicate that the department had any interest in whether the public access was constructed or how it should be laid out. On the basis of the record before us we cannot conclude that, as a matter of law, a conflict of interest was shown which would invalidate the commission's actions. The trial court was in the best position to evaluate Mr. Caswell's testimony. As the court's ruling on the issue is not unreasonable and is supported by the record, it is affirmed. *Powell v. Gagne*, 102 N.H. 256, 154 A.2d 250 (1959); *Hahn v. Hemenway*, 96 N.H. 214, 72 A.2d 463 (1950).

Exceptions overruled.

BOIS and DOUGLAS, JJ. did not sit; the others concurred.

APPENDIX B

THE STATE OF NEW HAMPSHIRE

BELKNAP, SS.

SUPREME COURT

No. 7452

THE LEO FOUNDATION

v.

THE STATE OF NEW HAMPSHIRE

MOTION FOR REHEARING

NOW COMES the Plaintiff, the Leo Foundation, in the above-entitled matter and respectfully moves for a rehearing and specifically assigns as reasons therefor, the following:

1. The Court's ruling that "... we cannot conclude that, as a matter of law, a conflict of interest was shown which would invalidate the Commission's actions." was improper. It is undisputed that payments for damages for the property taken and for construction come from the Highway Department budget. The Highway Department made the determination, prior to convening of the Commission, that there was no public access to Lake Manning. It is also undisputed that Maurice Caswell, a Commission member, was a full-time employee of the Highway Department as a right-of-way agent. The due process requirements of the State and Federal Constitutions were violated by Mr. Caswell's participation in the decision of the Commission.

2. The Constitutional due process requirements of the Fifth and Fourteenth Amendments to the United States Constitution

mandate that the Commission's decision be declared void because the Commission was an unfair tribunal.

Respectfully submitted,
The Leo Foundation
By Its Attorneys
Nighswander, Lord, Martin & KillKelley
By David J. KillKelley

April 7, 1977

I hereby certify that a copy of the within Motion for Rehearing has been mailed to David H. Souter, Attorney General and Roger G. Burlingame, Assistant Attorney General, this 7th day of April 1977.

By David J. KillKelley

APPENDIX C

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

Case No. 7452

THE LEO FOUNDATION

v.

STATE OF NEW HAMPSHIRE

April 29, 1977

Motion for rehearing denied.

Concord, N.H.
April 29, 1977
George S. Pappagianis,
Clerk

Supreme Court, U. S.
E I L E D

SEP 19 1977

MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-103

The Leo Foundation,
Petitioner

v.

The State of New Hampshire,
Respondent

**ON PETITION FOR A WRIT OF CERTIORARI
FROM THE SUPREME COURT OF NEW HAMPSHIRE**

BRIEF OF RESPONDENT IN OPPOSITION

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-103

The Leo Foundation,
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The State of New Hampshire,
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On Petition for a Writ of Certiorari
from the Supreme Court of New Hampshire

BRIEF OF RESPONDENT IN OPPOSITION

REPORT OF OPINION BELOW

The decision of the New Hampshire Supreme Court which the Petition for a Writ of Certiorari seeks to review is reported as *Leo Foundation v. State*, ___ N.H.___, 372 A.2d 1311 (1977).

STATUTE INVOLVED

N.H. Rev. Stat. Ann. Ch. 235 (1964)

ARGUMENT

I. No Substantial Federal Question is Presented

It is well established that "a review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor." U.S. Sup. Ct. Rule 19:1; *Durham v. United States*, 401 U.S. 481, 483 (1971). Chief among the factors

which this Court will consider in reviewing a state court decision through certiorari are whether the state court has decided a substantial federal question not previously determined by the Court or whether a state court's decision with respect to a substantial federal question represents a departure from applicable decisions of the Court. U.S. Sup. Ct. Rule 19:1(a). In the instant Petition, none of these circumstances are present.

In the first instance, the Petition does not present a federal question of substance to be determined by this Court. That a citizen of this country cannot be deprived of property without "due process of law" is, as Petitioner suggests, a substantial right. The substantiality of the right, however, has no bearing on the substantiality of the question sought to be certified. The sole issue is whether a substantial federal question is presented by a determination by the highest court of a state that the presence of an employee of the state highway department on a three member highway layout commission does not, as a matter of law, and under the particular circumstances before the court did not, as a matter of fact, constitute such a conflict of interest as to render the decision of the commission void. *Leo Foundation v. State*, ___ N.H. ___, 372 A.2d 1311 (1977).

The cases cited by the Petitioner in support of its Petition are wholly inapposite to the core issue. *Johnson v. Mississippi*, 403 U.S. 212 (1971) and *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971) both concern the impartiality of a judge to preside over a contempt proceeding where the alleged contempt had occurred before the same judge. *Bloom v. Illinois*, 391 U.S. 194 (1968) concerns the right to a jury trial for prosecution of a criminal contempt. It is difficult to see how these cases could be used to further, as Petitioner must, the proposition that a substantial federal question is raised by the facts of this case. The petitioner has not demonstrated the existence of any conflict between the decision of the Supreme Court of New Hampshire and one of this Court or any other federal court. Nor has it alleged the existence of a substantial and unsettled federal question that reaches a problem beyond

the academic or episodic. See *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955). A decision by the Court in this instance would affect few others than the litigants themselves. *Magnum Import Co. v. Coty*, 262 U.S. 159, 163 (1923).

II. The Decision of the New Hampshire Court Rests on Adequate and Independent State Law Grounds

The existence of an interest, pecuniary or otherwise, that will disqualify an individual from rendering an impartial decision in a matter depends on circumstances and relationships. *American Cyanamid Co. v. Federal Trade Commission*, 363 F.2d 757, 763-64 (6th Cir. 1966); *Tumey v. Ohio*, 273 U.S. 510, 532 (1927). In reaching its decision in *Leo Foundation v. State*, ___ N.H. ___, 372 A.2d 1311 (1977), the New Hampshire Supreme Court directly addressed the factual issue which underlies the Petitioner's claim of deprivation of property without due process. It reaffirmed an earlier holding that the appointment of an employee of the highway department to a layout commission was not forbidden under the relevant statute, N.H. Rev. Stat. Ann. Ch. 235. *Papademas v. State*, 108 N.H. 456, 458, 237 A.2d 665, 667 (1968). Moreover, it could find "nothing in the record to indicate that the [highway] department had any interest in whether the public access was constructed or how it should be laid out." *Leo Foundation, supra*, 372 A.2d at 1314. The decision of the New Hampshire Supreme Court is thus rooted in determinations of law and fact that would be dispositive of the matter, irrespective of the due process issue urged by the Petitioner.

CONCLUSION

Because the Petitioner has failed to demonstrate the existence of a substantial federal question arising out of the decision of the Supreme Court of New Hampshire, and because the New Hampshire Supreme Court's decision rests on factual and legal considerations independent of the issue for which review is sought, the Petition for a Writ of Certiorari ought to be denied.

Respectfully submitted,

David H. Souter
Attorney General

James E. Morris
Assistant Attorney General

COUNSEL FOR RESPONDENT

September 16, 1977

I, David H. Souter, Counsel for Respondent and a member of the bar of this Court, do hereby certify that in accordance with Rule 33, three copies of Respondent's Brief in Opposition were served this day by mailing them, first class, postage prepaid, to Arthur H. Nighswander, Counsel for Petitioner, at P.O. Box 189, Laconia, New Hampshire, said address being within 500 miles of the point of mailing.

DAVID H. SOUTER
Attorney General
State of New Hampshire

Concord, New Hampshire
September 16, 1977